No. 415.
Sup. Brf. of Gardiner & Taylor for D. E.
Filed Mar. 9, 1898.

Office Supreme Court
FILED
MAR 9 189
JAMES H. McKENNE
CLE

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

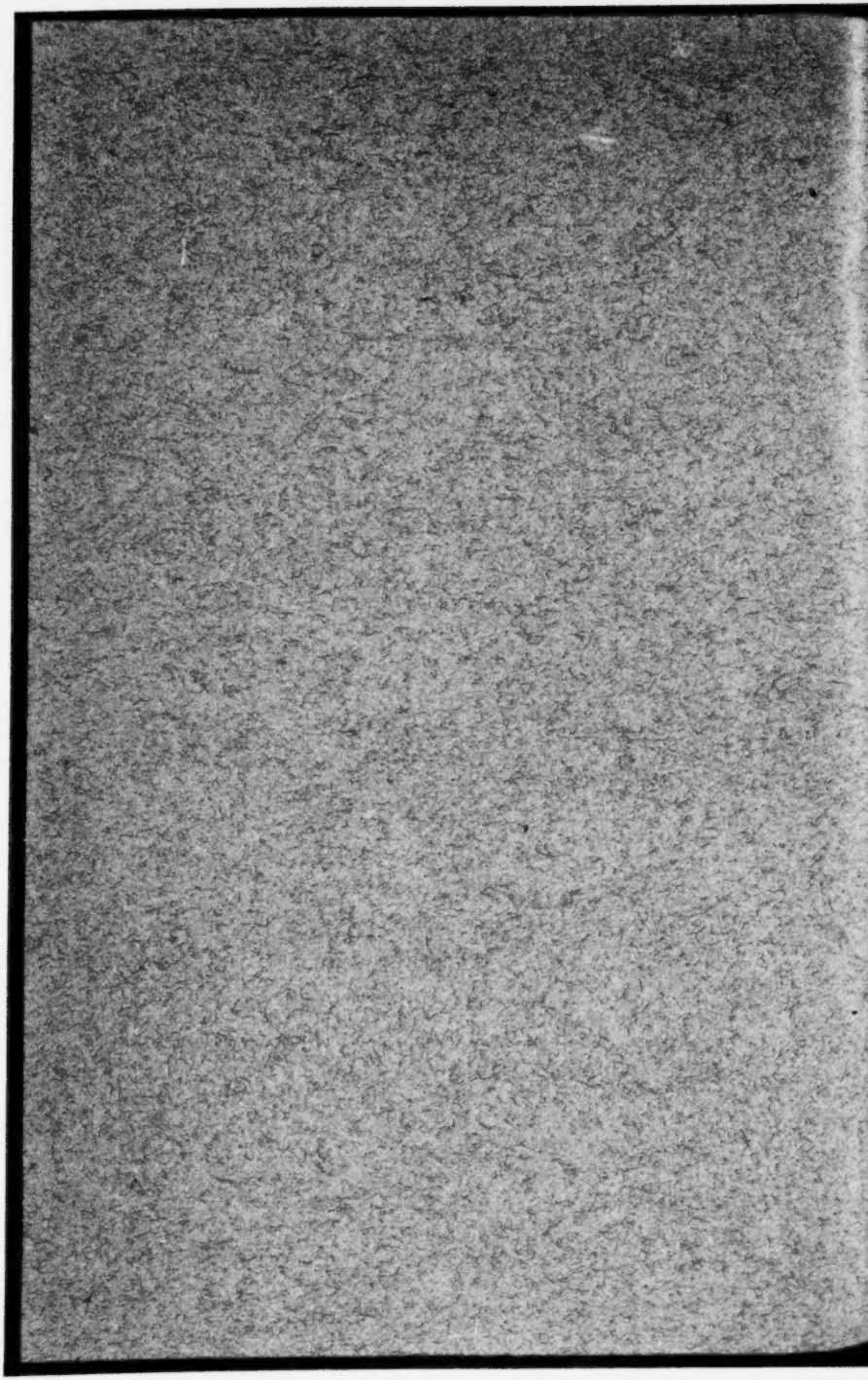
THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

ASA BIRD GARDINER,
District Attorney

ROBERT C. TAYLOR,
Counsel of the Medical Society,
of the County of New York,
of Counsel.

10946



In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

The range of argument in this case is so vast that, for reasons of convenience, it has been thought wise to divide it up into two briefs.

The first or main brief establishes, it is hoped, a broad question of law; namely, that **the exclusion of an ex-convict from the practice of medicine is a proper exercise of the police power.**

In this supplementary brief it is proposed to argue that the legitimate exercise of the police power is not restrained by the *ex post facto* clause of the Constitution.

THROUGH POOR COPY

POINT I.

The Scope of this Brief Outlined.

In this brief it is taken for granted that the Constitution of the United States was designed to create a new system, and that certain of its provisions, particularly the contract clause and the *ex post facto* clause, were intended to remedy what, in the light of history, had proved to be an intolerable condition of affairs.

It is believed, however, that no violent change in the essential nature of the State governments was designed; and that it was not contemplated by any of the States, which adopted the Constitution, that their sovereign police powers over internal regulation would be in any essential abridged.

Certain admitted mischiefs were, of course, to be corrected.

To this end, along customary lines of construction, the **Old Law,** the **Mischief** and the **Remedy** will be considered; and as much light as can be gathered from numerous decisions of this Court will be brought to bear upon the relation of the *ex post facto* clause to the reserved police power of the State.

POINT II.

The Old Law, the Mischief and the Remedy.

One of the accepted canons of construction is:

> "Advert to the three Points of the **Old Law,** the **Mischief** and the **Remedy,** and let the construction tend to suppress the Mischief, and advance the Remedy."
>
> 1 Minor's Insts., p. 40, citing 1 Bl. Com., 87.

BLEED

That this principle of construction is applicable to the Constitution has been frequently determined. We content ourselves with a single reference to the words of Chief Justice Marshall, who, at the beginning of his celebrated opinion in the Dartmouth College Case said with reference to the contract clause:

> "Since this clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy."
>
> Dartmouth Coll. Case, 4 Wheat., at p. 628.

POINT III.

The Old Law: the untrammelled powers of the States at the time of the adoption of the Constitution.

It is a matter of history that at the time of the adoption of the Constitution the several States were independent sovereignties, each of which was possessed of all the powers of the British Parliament.

This was, so to speak, the old order —— the **Old Law.**

The sovereign independence of the States at that time has been freqently commented upon by this Court.

For example they were referred to by Baldwin, *J.*, as—

> "Those States, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the Revolution, the prerogative of the Crown, and the transcen-

HROUGH POOR COPY

dent power of Parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority."

R. I. *v.* Mass. 12 Peters, p. 720.

Again, by CHASE, *J.:*

"Not that the United Colonies jointly in a collective capacity, were independent States, etc., but each of them was a sovereign and independent State, that is, that each of them had a right to govern itself by its own authority and own laws without any control from any other power upon earth."

Ware *vs.* Hylton, 3 Dall, at p. 224.

And recently in the expressive language of Chief-Justice Waite:

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves."

Munn *vs.* Illinois, 94 U. S., at p. 124.

In those days the States had the power to pass bills of attainder.

Cooper *vs.* Telfair, 4 Dall., 14.

And likewise power to pass laws impairing the obligation of contracts.

Owings *vs.* Speed, 5 Wheat., 420.

BLEED

That they had also the right to pass *ex post facto* laws must go without saying; for otherwise the inhibition against passing such laws, contained in the Constitution, would have been needless and would now be unmeaning.

POINT IV.

The mischief; the precise meaning of ex post facto.

By way of introduction we would note that the **ex post facto** clause does not stand by itself in the Constitution, but that the clause is as follows:

> "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; **pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts**; or grant any title of nobility."
>
> U. S. Cons., Art. 1, Sec. 10, Sub-d. 1.

It appears at once that the *ex post facto* clause is associated with the prohibition against passing bills of attainder and laws impairing the obligation of contracts.

In the language of Johnson, *J.*, in Ogden *v.* Saunders, 12 Wheat, 266.

> "By classing bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision

THROUGH POOR COPY

> against arbitrary and tyrannical legislation over existing rights, whether of person or property" (p. 286).

In the same way Mr. Justice Miller, in Kring *v.* Missouri, 107 U. S., 221, discussed the contract clause and the *ex post facto* clause, together saying with regard to the *ex post facto* clause:

> "Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence of the Constitution which forbids the States to pass any law impairing the obligation of contracts (page 232–3).
> * * * * * * *
> "Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction?" (pages 233–4).

This circumstance is noted for the reason that in the course of the argument many illustrations have been taken from the decisions of this Court relating to the **contract clause** of the Constitution, and counsel believes that as both clauses are *in pari materia*, any illustrations drawn from the literature of the one will be apt and pertinent as illustrating the other.

In attempting to arrive at the exact meaning of the words *ex post facto*, it is of supreme interest to notice that in the case of Calder *v.* Bull, 3 Dal., 386, in which the *ex post facto* clause was first construed, the Court, through Chase, *J.*, expressed itself as follows:

> "The prohibition, 'that no State shall pass "any *ex post facto* law,' necessarily requires "some explanation; for naked and without

PLEED

"explanation it is unintelligible, and means "nothing (p. 390).

* * * * * *

"I am under a necessity to give a construc- "tion or explanation of the words '*ex post* "*facto*,' because they have not any certain "meaning attached to them" (p. 395).

It is obvious, therefore, that it is to Calder *v.* Bull that we must look, both to see exactly what *mischief* the framers of the Constitution sought to suppress, and also to see if the Statute of the State of New York which is now before the Court produces **such mischief as was then sought to be guarded against.**

Counsel has made an exhaustive examination in various directions, with a design of ascertaining what the words "*ex post facto*" mean, but in no place has he found a fuller statement than in the case of Calder *v.* Bull. This statement is so pertinent to the question now before the Court, that the words of the case are quoted at great length.

The design is to show exactly what was in the mind of the framers of the Constitution when the clause in question was adopted.

Calder *v.* Bull, 3 Dall., 386.

Per CHASE, *J.*

"The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of

HROUGH POOR COPY

judicial power. Sometimes they respected the crime by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment; and in other cases they inflicted greater punishment than the law annexed to the offense. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. **To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any ex post facto law** (p. 389).

* * * * *

"The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, **and shall punish him for having done it.** The prohibition, considered in this light, is an additional bulwark in favor of the personal

BLEED

security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts (p. 390).

* * * * *

"The expressions '*ex post facto* laws,' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

"I also rely greatly on the definition, or explanation of *ex post facto* laws, as given by the conventions of Massachusetts, Maryland and North Carolina, in their several constitutions or forms of government.

"In the declaration of rights by the Convention of Massachusetts, part first, section 24th: 'Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws are unjust, etc.'

"In the declaration of rights, by the Convention of Maryland, article 15th: 'Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, etc.'

"In the declaration of rights by the Convention of North Carolina, article 24th, I find the same definition precisely in the same words as in the Maryland Constitution.

"In the declaration of rights by the Convention of Delaware, article 11th, the same

THROUGH POOR COPY

> definition was clearly intended, but inaccurately expressed, by saying: 'Laws punishing offences (instead of actions, or facts) committed before the existence of such laws, are oppressive, etc.'" (pages 391–2).

Here, then, is a vivid picture, painted by an eyewitness, of the nature of the mischief which the *ex post facto* clause was designed to suppress. Not a word of this opinion can be appealed to to sustain any claim that the *ex post facto* clause was designed to abridge the police power.

Indeed, the case holds, expressly the other way; for in defining the limitations upon tyrannical power imposed by the *ex post facto* clause, CHASE, *J.*, with abundant caution, says:—

> "It appears to me a self-evident proposition that the several State legislatures retain all the powers of legislation delegated to them by the State constitutions, which are not expressly taken away by the constitution of the United States."
>
> 3 Dall., at p. 387.

Counsel would now, in passing, add the testimony of Chief Justice Marshall as to the origin of *ex post facto* laws, in which the justification for their existence is expressed as follows:

> "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the **violent acts** which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those **sudden and strong passions** to which men are exposed. The restrictions of the legislative power of the States are

BLEED

obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

Fletcher *v.* Peck, 6 Cranch, 328, at pp. 337–8.

Thus we see that at the beginning, this Court carefully recognized the origin of the *ex post facto* clause; held that it was designed to restrain the **violent passions of men**; and held that it was to be limited to the prohibition of retrospective laws of a penal or criminal character.

This doctrine has been steadily adhered to.

Watson *v.* Mercer, 8 Pet., 88.
Carpenter *v.* Penn., 17 How., 456.
Locke *v.* New Orleans, 4 How., 172.
B. & S. R. R. Co. *v.* Nesbit, 10 How., 395.

The striking feature of all this lies in the fact that, at the very outset this Court took the unmeaning words *ex post facto* and gave them a most limited signification.

This was done because the Court would not *by implication* cut down the authority of the State of Connecticut, whose law was thus assailed (see opinion, p. 387), and because the Court **would not go farther than it felt itself bound to go**; nor declare any law void except in a very clear case (p. 395).

By subsequent adjudication another marked limitation has been superadded, in favor of the States; namely that a statute which merely **affects the remedy** cannot be considered *ex post facto*, as the States never surrendered control over mere legal procedure.

See Gibson *v.* Mississippi, 162 U. S., 565, and cases cited.

THROUGH POOR COPY

Counsel has pondered these cases. He can see no likeness between the passionate and violent measures denounced in Calder *v.* Bull, and the carefully devised statute of New York which seeks to protect its people against practitioners of medicine who have attained infamy.

POINT V.

The Remedy which the ex post facto clause was designed to effect.

It is not desired to make the form of the argument too artificial. Nevertheless it seems fair to conclude that the Remedy intended to be gained by the *ex post facto* clause, like the remedy designed to be gained through the prohibition of bills of attainder or laws impairing the obligation of contracts, was to disable the individual States from perpetrating wrong upon their respective citizens.

Looked at from this point of view it is impossible to see how, from these "associated clauses," the States can be held to have intended to divest themselves of their legitimate police power.

We do not find any case in which it is held in terms that the *ex post facto* clause does not affect the police power of the State. This proposition, however, follows by necessary inference from well considered decisions with relation to the associated contract clause, and other clauses of the Constitution or its amendments.

Thus with regard to the *contract clause* we have the words of Chief Justice Marshall:

> "Since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined,

BLEED TH

to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution **did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."**

Dartmouth College Case, 4 Wheat, at p. 628–9.

In another great case the Court held that the contract clause was not intended to impair the police power, and the reasoning of WASHINGTON, *J.*, is unanswerable.

"It is apparent that the sphere of State legislation upon subjects connected with the contracts of individuals, would be impaired **beyond what it can for a moment be believed the sovereign states of this Union would have consented to**; for it will be found upon examination that there are few laws which concern the general police of the state, or govern the citizens in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form."

Ogden *v.* Saunders, 12 Wheat., at page 258–9.

The reason given—**that the States would never for a moment have consented to such divestment**—is most striking.

We have already seen that under the decisions in Ogden *v.* Saunders, 12 Wheat., 213, at page 286, and

OUGH POOR COPY

Kring *v.* Missouri, 107 U. S., 221, at page 223, the analogies between the *ex post facto* clause and the contract clause are complete. Hence it follows, by parity of reasoning, that the sovereign States would never for a moment have consented to any impairment of the sphere of State legislation, upon like matters, when they adopted the *ex post facto* clause.

In the period of doubt and indecision which followed the promulgation of the Constitution and preceded its adoption by the States, we know that there was great uncertainty as to whether the States would adopt it at all.

It was feared that such a mighty structure might be reared that the State governments would run the danger of annihilation. With the adoption of the Constitution the first ten amendments were added, as limitations upon the powers of the Federal Government.

A contemporaneous account of the reluctance with which the Constitution was adopted is vividly given in the pages of the *Federalist.* The assurances of its gifted authors may be accepted now as representations in reliance upon which the States were induced to part with such of their sovereignty as they surrendered to the general government.

We reproduce the words of HAMILTON which held out to the States the promise that by so doing they would not surrender the integrity of their control over **"internal order, improvement and prosperity."**

The Federalist, No. XLIV and XLV (Dawson's edition).

"The powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs concern the lives, liberties and

BLEED

properties of the people and the **internal order, improvement and prosperity** of the State (page 323).

* * * * * * *

By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for (page 326).

* * * * * * *

The powers proposed to be lodged in the Federal Government are as little formidable to those reserved to the individual States; as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded of a meditated and consequential annihilation of the State Governments must, on the most favorable interpretation be ascribed to the chimerical fears of the authors of them." (page 333).

The solemn assurances thus held out by the far-seeing Hamilton have been amply vindicated by this Court; and the doctrine has been repeatedly laid down that, except as far as it is restrained by the Constitution, the Sovereignty of the States remains unimpaired.

> "These powers proceed not from the people of America, but from the people of the several States, and remained after the adoption (of the Constitution) what they were before, except so far as they may be abridged by that instrument.'
>
> Sturgis & Crowninshield, 4 Wheat., 122, per MARSHALL, *C. J.*, at 192-3.

Or in the words of TANEY, *C. J.*,

> "We cannot deal this with the rights reserved to the States, and by legal intendment and mere technical reasoning take away from them any portion of that power over their own **internal police,** and improvements which

HROUGH POOR COPY

is so necessary to their well being and prosperity."

Charles River Bridge Case, 11 Pet., at p. 552.

But not only does this condition of affairs repose upon general principles and upon the accepted history of the nation; but, moreover, the jealousy of the people of the States lest the sovereignty of the States should be unduly diminished by the Constitution, is shown by the positive terms of the **Tenth Amendment** to the Constitution:

> "On the other hand it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States.
>
> These deductions do not rest upon general reasons, plain and obvious as they seem to be. They have been **positively recognized** by one of the articles in the amendments of the Constitution which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'".

Per STORY, *J.*, in Martin *vs.* Hunter's Lessees, 1 Wheat., 304. at p. 325.

In this connection we may add with advantage the solemn language of the great Chief Justice MARSHALL, in Barron *v.* Baltimore, 7 Pet. 244, in which the reason for the adoption of the first ten amendments was at length discussed.

He recapitulates the history of the times;—that the great Revolution, which established the Constitution of the United States, was not effected without

BLEED

immense opposition; that serious fears were entertained that the powers which the patriotic statesmen deemed essential to union might be exercised in a manner dangerous to liberty; and that the amendments demanded security against the apprehended encroachments of the general government, and that to quiet the fears thus extensively entertained the amendments in question were adopted.

In the present topic we have confined ourselves as closely as possible to the proposition that **contemporaneous history and exposition** show plainly that it was not part of the intention of the States to surrender up any portion of their legitimate police power, when they adopted the Constitution. As the right to exclude a convicted felon from the practice of medicine would have been abundantly within the powers of the States, we confidently conclude that the States cannot be held, by any method of argument, to have intended to surrender that power of exclusion.

POINT VI.

This Court has consistently maintained the reserved powers of the States.

Since the adoption of the Constitution, this Court has consistently maintained the reserved powers of the States.

As to the mere elaboration of the subjects controlled by the police power, we are not concerned. All agree that it comprises the regulation of the practice of medicine; and the many cases presented in our main brief sufficiently cover that topic.

We desire in this point briefly to collate the

HROUGH POOR COPY

various constitutional provisions which have been appealed to by lawyers in efforts to declare State statutes unconstitutional.

This Court has more than once expressed its surprise at these constantly repeated assaults upon State legislation. For instance, in Davidson *vs.* New Orleans, 96 U. S., 97, Mr. Justice Miller refers to the "strange misconception of the scope of the provision as found in the Fourteenth Amendment"; and states that it seems to be looked upon as a means of bringing before the Supreme Court of the United States the abstract opinions of every unsuccessful litigant in the State Courts of the justice of the decision against him, and of the merits of the legislation upon which such a decision may be founded.

And later and in R. R. Co. *vs.* Humes, 115 U. S., 512, Mr. Justice Field repeats these words of Mr. Justice Miller:

> "with an expression of increased surprise
> "at the continued misconception."

A bare reference to these decisions is made; but in each instance it will be found that the Court has held that the legitimate exercise of the police power involves no excursion beyond the proper limits of State power as defined by the Constitution or its amendments.

Of these in order:

Amendments 1 to 10 inclusive do not restrain the police power.

> Barron *vs.* Mayor, 7 Pet., 243, and many other cases.

Nor do the 13th, 14th or 15th amendments.

> Slaughter House Cases, 16 Wall., 36.
> Plessy *vs.* Ferguson, 163 U. S., 537.

BLEED TH

Nor does the "letters-patent clause" prevent State regulations of the sale of a dangerous article.

Patterson *vs.* Kentucky, 97 U. S., 501.

Nor does the "taxes duties, imposts and excises" clause prevent local pilotage regulations.

Cooley *vs.* Wardens, 12 How., 299.

Nor does the commerce clause interfere with purely internal control.

Hennington *vs.* Georgia, 163 U. S. 299, as a type of many cases.

Nor does the naturalization clause prevent a State from putting a foreigner upon the same footing as its own citizens.

Dred Scott *vs.* Sandford, 19 How., 393.

Nor does the bankruptcy clause invalidate State laws not conflicting.

Ogden *vs.* Saunders, 12 Wheat., 213.

Nor does the "punishment of counterfeiting" clause prevent the States from punishing the circulating of counterfeit money.

Fox *vs.* Ohio, 5 How., 410.

Nor does the *ex post facto* clause inhibit retrospective legislation of other than a criminal or penal character, or which merely affects the remedy.

Calder *vs.* Ball, 3 Dall., 386.
Gibson *vs.* Miss., 162 U. S., 565.

All of these cases, so briefly cited, show that there is no inherent antagonism between the legitimate exercise of the police power and the United States Constitution.

ROUGH POOR COPY

As far as the consistency of the police power with the "contract clause" is concerned, that doctrine has been worked out so exquisitely that a more analytical presentation of it seems necessary.

From the beginning it was held that without impairing the obligation, the remedy might be modified as the State might ordain.

Sturges *vs.* Crowninshield, 4 Wheat., 122.

For, as was later said by WAITE, *C. J.:*

> "The regulation of the forms of administering justice by the Courts is an incident of sovereignty. The surrender of this power is never to be presumed."

Cairo & F. R. R. *vs.* Hecht, 95 U. S., 168.

When the question of the obligation of the States' own alleged contracts—*i. e.*, charters and other authorities—came before the Courts; at first the great decision in the Dartmouth College Case seemed to raise an insurmountable barrier against the possibility of subsequent modification.

But later the necessity of making new regulations, to meet new conditions asserted itself.

Thus where **monopolies** are claimed, in a series of cases commencing with the Charles River Bridge Case, 11 Pet. 552 and ending with the recent case of Water Power Co. *v.* Water Commrs. 168 U. S. 349, it seems to be held that such grants are subject to the paramount right of the State to make later grants if the public interests require it.

Again as to grants giving **exemptions from taxation,** the most recent ruling seems to hold that they are mere bounties, not containing any of the elements of a pure contract.

See Grand Lodge *v.* New Orleans, 166 U. S., 143.

BLEED T

Again (and in this development we are peculiarly interested) where matters involving the **public morals,** such as lotteries or the liquor traffic, are concerned ; or where matters involving the **public health** are concerned, apparent authorities, whether by charter or otherwise, are held to be mere licenses subject to later control.

Beer Co. *v.* Mass., 97 U. S. (liquors).
Gray *v.* Conn., 259 U. S. 74 (liquors).
Stone *v.* Miss., 101 U. S. 814 (lotteries).
Douglass *v.* Ky., 168 U. S. 488 (lotteries).
Dent *v.* W. Va., 129 U. S. 114 (medicine).

And these later cases have emphatically stated the sound doctrine of overruling necessity.

Namely :

That the Legislature cannot, by any grant, divest itself of its police power; nor bind its successors in such a way as to deprive them of the power of legislating for the public good.

It is upon this doctrine that the people of the State of New York rest this Hawker Case.

POINT VII.

Cummings and Garland cases, 4 Wall, 277, distinguished.

As the claim of the defendant that the statute under observation is unconstitutional, is based upon these Cummings and Garland cases, the Court will surely give them painstaking consideration. In this connection we desire only to bring out prominently the *ratio decidendi* of the cases. Stripped of all verbiage, the decision of the Court was upon the ground that the disqualification pro-

IROUGH POOR COPY

duced by the test oath was, as a matter of fact, **punishment, and designed as such**.

The Court discusses :

(1) The *unprecedented severity* of the test oath, which allowed no distinction between acts springing from malignant enmity, and such as might be prompted by charity, affection or relationship (pp. 316–7).

(2) That the test oath bore *no relation* to the fitness for the profession (p. 318).

(3) That the test oath related only to *past acts* (p. 319).

This is the gist of these cases, and it is believed that there is no fair analogy between them and the Hawker case.

As discovering the very essence of the case ; viz., that the deprivation complained of was, in fact, punishment, the exact words at page 320 are most material :

> "The deprivation of any rights, civil or political, previously enjoyed, **may be punishment,** the circumstances attending and the causes of the deprivation determining this fact" (p. 320).

We must not overlook the use of the salient word **"may,"** for therein lies the whole reasoning of the case. The "circumstances attending," and the "causes of the deprivation" were manifestly the bitter passions engendered by the war ; and it is respectfully submitted that there is not a "circumstance attending" in this Hawker case which will bring it within the rule of the Cummings or Garland cases.

The above words **"may be punishment"** find strong support in the words of WAITE, *C. J.*:

BLEED

> "From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances **they may, but not under all.**"
>
> Munn *vs.* Illinois, 94 U. S., at p. 125.

It is pertinent to observe, at this point, that the civil war brought to pass not only "test oaths"; but likewise the provisions of the 13th, 14th and 15th Amendments.

To the interpretation of these amendments the energies of this Court have been addressed for thirty years; and its innumerable decisions have developed and firmly established the doctrine that the incidence of a police regulation involves **no deprivation** of life, liberty or property such as is contemplated by the amendments.

Consult, among many cases,

Barbier *vs.* Connelly, 113 U. S., 27.
In re Rahrer, 140 U. S., 545.
Giozza *vs.* Tiernan, 148 U. S., 657.
R. R. Co. *vs.* Bristol, 151 U. S., 556.

The question is one of legislative **intent**; and the Court must assume that the legislative intent was to protect the public health.

Sweet *vs.* Rechel, 159.

The **Dent** case, which we have presented at such length in the main brief, makes the legislative intent the turning point; for it distinguished the **Cummings** and **Garland** cases upon the ground that they were designed to punish, and sustained the law of West Virginia as intended to secure skill and learning in the practice of medicine,

THROUGH POOR COPY

so that the community might trust with confidence one receiving a license under authority of the State.

Dent case, 129 U. S., at p. 128.

In a recent case where a regulation of Georgia as to Sabbath work on railroads was assailed as regulating interstate commerce, the Court looked at the legislative **intent** and saw nothing to suggest that there was any other purpose than to prescribe a rule of civil duty for all, who, on the Sabbath day, were within the territorial jurisdiction of the State.

Hennington *v.* Georgia, 163 U. S., 299.

In this **Hawker** case, as in the case last cited, and as in **Dent** case, the essence of the legislation lies in its **intent to protect the public,** and there is a total absence of intent to punish.

Upon this question of intent, this Court has, in the recent case of Moore *v.* Missouri, 159 U. S., 673, very fully shown that a previous conviction may be taken into account, and yet the action of the State in so doing could not be regarded as punishment. There a statute enacted that for subsequent offences heavier punishment should be imposed upon the offender We do not quote from the opinion, but note that Mr. Chief Justice Fuller, upon page 676, observes "that the increased severity **is not a punishment for the same offence** for the second time, but a severer punishment for the subsequent offence;" and later upon page 677, "that the punishment is increased because by his persistence in the perpetration of crime he has **evinced a depravity** which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence."

Moore *v.* Missouri, 159 U. S., 675.

The object in quoting this Moore case is to show that this Court has held that it is proper to take a

past conviction into account in order to determine the **present merit** of the convict for heavier punishment.

There appears to be a complete analogy between that power and the power of the State to take a past conviction into account as determining **present fitness** for a given profession.

In that regard this Moore case seems to be in complete harmony with the cases of

Murphy *v.* Ramsey, 114 U. S., 15.
Washington *v.* State, 75 Ala., 582.
Foster *v.* Police Commissioners, 102 Cal., 483.
United States *v.* Chew Cheong, 61 Fed. Rep., 200,

which we have cited in the main brief upon the proposition that **past conviction** may be taken into account as determining **present fitness.**

In the high ground which was taken by the Judges in the Cummings case, it was stated–

> "That the Constitution deals with substance, " not shadows. Its inhibition was levelled at " the thing, not the name." (P. 325.)

It is precisely that doctrine for which we are contending now. We conceive that the decision in the Cummings case was absolutely just and fair. We see no reason for any conflict between that case and this. **The underlying motives are wholly different.**

In our judgment the claim of Hawker, that he is protected under the doctrine of the Cummings case seems unwarrantable.

The people of the State of New York respectfully protest against any such unwarrantable extension of the doctrine of the Cummings case, as opening the door to grave error.

THROUGH POOR COPY

Manifestly, as this Court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

Pollock *v.* F. L. & T. Co., 157 U. S., 429, at page 576, per Mr. Chief Justice Fuller.

POINT VIII.

The possible consequences of reversal.

It has been over and again held that the possible consequences of a construction are most material to be taken into account.

If this judgment were reversed, it would seem that the door would be opened to consequences almost intolerable.

In the first place, the distinction between proper regulation and punishment would be destroyed and great confusion would result. The logical consequence of such a decision would be to render a State incompetent to take into account a prior conviction in order to determine present fitness; for it could then be fairly claimed in every case, that additional punishment was imposed. Such an interpretation of the *ex post facto* clause, would lead to the proposition that the States had yielded up their right to take into consideration the very circumstance which would weigh most heavily with a business man in the conduct of his own concerns, namely, present fitness as affected by previous conviction of felony.

BLEED TI

We have seen under Stone *vs.* Mississippi, 101 U. S., 814, as recently commented upon in Douglass *vs.* Kentucky, 168 U. S., 488, that the very essence of the police power is its capacity to "vary with varying circumstances."

A superficial glance at the condition of this country will show that in the matter of the regulation of the practice of medicine, legislation must change with the times.

It is obvious that in a sparsely settled country, where the inhabitants have opportunities of becoming acquainted with one another, little or no danger could follow from the practice of medicine by a felon.

Indeed, the smallness of the population might cause greater inconveniences if he were excluded from practice. Upon the other hand, if the population is increased, and, particularly, if large cities spring up, to which the baser element of the population is attracted, conditions might be entirely altered. Individuals are thereby compelled to trust more and more to the good faith of each other; their opportunities for investigation become less; and just to this extent the necessity for guarantees becomes greater.

Applying this to medical legislation, it has been the invariable rule of the States to make the regulation more comprehensive, just in proportion as the population increases, and as society becomes more complexly organized. The wisdom and good faith of such modifications are abundantly apparent.

Now, when in the process of improvement, the State had elected to exclude those who were educationally deficient, as it could do under the authority of the Dent case, 129 U. S., 114; it might well later find it wise to exclude those who were deficient in good moral character; yet the plaintiff in error, Hawker, would claim that by the wording of the *ex post facto* law the State would run up against a stone wall; and would be lacking in power to exclude

ROUGH POOR COPY

those who were most unfit; those who had been solemnly adjudicated to be unfit.

It seems absurd to claim that the States, at the adoption of the Constitution, ever intended to surrender such a power.

From another point of view, we know that although this country is divided up into separate States, it is substantially a single country, and that people pass from State to State without let or hinderance. It is also a well known fact that the chief crimes connected with the medical profession are perpetrated in large cities, and that it is to large cities that individuals resort when it is their desire to submit to medical treatment for vicious purposes.

Assuming then that the retrospective feature of the New York law under consideration were unconstitutional, it would follow that as soon as a man was convicted of a felony in New York City, and thereby precluded from practice, he could move to Philadelphia or Boston, or for that matter across the Hudson River to Jersey City, and continue his practice without let or hinderance; for by the artificial construction of the *ex post facto* clause contended for by the plaintiff in error, Hawker, the State to which the fugitive had gone would have no right to pass a statute excluding him from practice, which would apply to his case if he had been convicted before the statute was passed.

This seems to be a complete *reductio ad absurdum*. The history of the medical legislation in all the States shows plainly that it is altered from time to time, and made more and more comprehensive, just in proportion as the needs of the community justify it.

If a State suffered an incursion of felons before it had passed a Medical Law, it would for that reason be more grievously in need of such a law.

Thus, in the case assumed, what would be a valid test of fitness in New York, from which the con-

BLEED

vict had come, would be no test in New Jersey to which he had gone.

This seems to be a complete *reductio ad absurdum.*

Counsel knows from his experience with the cases of the New York County Medical Society, that very result of these medical laws is to drive violators from state to state.

Again, it is well known and frequently happens, that in the course of codifying laws, statutes are often repealed. In New York State, for example, as we have seen in the main brief, by Chapter 275, of the Laws of 1844, all medical regulations were abolished, and a new system had to be built up.

Assume then that at this date there were ex-convicts whose conviction had postdated the present medical law of New York, and who by it were plainly excluded from practice.

Assume then that the Medical Law was repealed and that practice by ex-convicts was no longer prohibited. Assume that afterwards, the same Medical Law was re-enacted, again prohibiting practice by ex-convicts. Could the ex-convict assail the subsequent law as imposing additional punishment, and yet recognize that the previous similar law possessed no such vice?

It is submitted that such a view, in the language of Mr. Justice Peckham, 145 N. Y., 44, would **mistake the foundation upon which the police regulations rest.**

It is believed that these considerations, and many others which they suggest to thoughtful minds, will show that the claim made by the plaintiff in error, Hawker, is altogether unsustainable.

In this point we have referred solely to the practice of medicine; but it is possible that conviction of felony might be made a disqualification along other lines, and no complaint could be made if such disqualification was created.

HROUGH POOR COPY

Precisely the same arguments would be applicable and precisely the same intolerable burden upon the sovereignty of the States could be claimed, if this judgment were reversed.

POINT IX.

The proper point of view for the resolution of the question before the Court.

Is it conceivable, that when the States adopted the Constitution, they could ever have intended to make their power to consider personal fitness to depend upon such narrow and rigid interpretation as is now advanced?

It goes without saying that any ruling which would place such arbitrary limitations upon the police power of the States would be a most decided negation of their sovereignty.

The maintenance of this sovereignty is one of the solemn duties of this Court, and is within the design and care of the Constitution.

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the **design and care** of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to **an indestructible Union, composed of indestructible States.**"
>
> Texas *v.* White, 7 Wall., 700, per Chase, *C. J.*, at page 725.

BLEED

Any other manner of construction would soon negative the possibility of "indestructible States."

We are taught by this Court ever to bear in mind that the question involved in this case must be resolved as of the very moment of the adoption of the Constitution.

> "We are too apt, in estimating a law passed at a remote period, to combine in our consideration all the subsequent events which have had an influence upon it, instead of confining ourselves, which we ought to do, to the **existing circumstances,** at the time of its passing."
>
> Ware *v.* Hylton, 3 Dall., 199, per Paterson, *J.*, at page 267.

In the light of the recent decision of this Court in Mattox *v.* United States, 156 U. S., 237, the Court would be almost justified in creating an exception to the *ex post facto* clause of the Constitution, if thereby alone the unfitness of an ex-convict could be taken into account.

In that case the question of the meaning of the words that the accused should be "confronted with the witnesses against him," was held not to create new rights so as to render it impossible to use the testimony of a witness who had been examined upon a former trial, but had since died.

Per Mr. Justice Brown:

> "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill

HROUGH POOR COPY

> of Rights are **subject to exceptions,** recognized long before the adoption of the Constitution and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and **farther than the safety of the public will warrant.**"
>
> Mattox *v.* United States, 156 U. S., 237, at p. 243.

In this case, however, we do not ask that any exception to the strict words of the Constitution should be raised. We simply ask that the distinction between punishment and disqualification for cause should be recognized; and that the State of New York should not be held to have punished a man when it never had any intention so to do.

We ask not that the doctrine of the police power shall be unduly extended, nor that the clause of the Constitution touching *ex post facto* laws should be in the slightest degree limited, but that the complete harmony of these two forces shall be vindicated.

Conclusion.

The briefs of counsel in this matter have extended to greater length than was at first intended. Counsel trusts, however, that no apology for this length is needed. The question before the Court is one of profound importance. The Court itself, of its own motion, has ordered a re-argument; and it has been thought that the Court would welcome any information which bore upon the subject, either directly or by analogy.

BLEED T

No. 415.

Office Supreme Court U. S.
FILED.
MAR 9 1898
JAMES H. McKENNEY,
CLERK.

415

In the Supreme Court of the United States.

BENJAMIN W. HAWKER,
Plaintiff in Error,

AGAINST

THE STATE OF NEW YORK,
Defendant in Error.

Skeleton Analysis.

Good moral character is a **proper qualification** to require of a physician.

(a) By New York Statutes (Main Brief, pp. 14–17).

(b) By other statutes (Main Brief, pp. 18–25).

(c) By adjudications (Main Brief, pp. 25–28).

Conviction of felony proves bad moral character.

Main Brief, pp. 29–31.

The Legislature has the right to fix an arbitrary standard.

Main Brief, pp. 33, 34, where see particularly Jones vs. Brim, 165 U. S., 180.

Physician's status is that of **a licensee.**

Main Brief, pp. 35–38, where see particularly Ohio vs. Gazely, 5 Ohio, 14, and Dent. vs. W. Va., at pp. 10, 11.

IROUGH POOR COPY

Licensee is amenable to the imposition of **further conditions.**

See generally Main Brief, pp. 39-50, and see particularly the following cases in the Main Brief: Dent vs. W. Va. at p. 10; Gray vs. Conn. at p. 40; Percy's case at p. 41; Health Dept. vs. Rector at p. 44, and Douglass vs. Kentucky at p. 48.

Hawker cannot claim that by granting him a license to practice medicine the State bargained away its power to make future general regulations which might control his right to practice.

See generally Main Brief, pp. 39–50, and see particularly Gray vs. Conn., pp. 40, 41, and Douglass vs. Kentucky, p. 48–49.

The legitimate incidence of the police power produces **no deprivation of property** within the constitutional inhibition.

See, generally, Main Brief, pp. 39–50.

Before the adoption of the Constitution the States had unlimited power.

Suppl. Brief, pp. 3 and 4.

In adopting the Constitution they did not intend to surrender any control over internal police.

See, generally, Suppl. Brief, at pp. 12-16, and particularly the quotation from the Federalist, at pp. 15, 16.

Calder vs. Bull, 3 Dall., 389, shows **what mischiefs** the *ex post facto* clause was designed to prevent.

Suppl. Brief, pp. 7–10.

It shows that the *ex post facto* clause was not designed to deprive the States of their internal police power; and that, in declaring a law void as *ex post facto*, the Court **should not go further than it was bound to go.**

Suppl. Brief, at p. 10, and also p. 11.

BLEED TH

There is nothing *ex post facto* in a regulation which allows a **past conviction** to be taken into account in determining **present fitness.**

"It does not seek * * * to operate as a punishment upon any offense at all. This disfranchisement operates upon the **existing** state and condition of the person, and **not upon a past offense."**

Main Brief, p. 52, quoting Murphy vs. Ramsay, 114 U. S., 15, and three other cases.

Mere exclusion from a profession for conviction of felony is **not a punishment** at all, but a protection of the public.

Main Brief, pp. 31-2, citing *Ex parte* Wall, 107 U. S., 265, referring to an attorney.

In the **Cummings** and **Garland** cases, "the question is not as to the existence of the police power, but whether that power has been made an instrument for the infliction of **punishment."**

Main Brief, at p. 7.

In those cases "the circumstances attending and the causes of the deprivation" showed the design to punish.

Suppl. Brief, at p. 22.

Here the statute is purely a general regulation touching the public health.

Main Brief, p. 61.

The question of the legislative **intent** is decisive.

Suppl. Brief, pp. 23-4.

In case of doubt the question of intent must be resolved in favor of the law.

Main Brief, pp. 60 and 61.

The State has the right to **exclude an existing practitioner** of medicine for not possessing new **educational requirements**—the **Dent** case.

Main Brief, pp. 10, 11.

In this case the State of New York only imposes a new **character requirement.**

ROUGH POOR COPY

BLEED

The question involved in this case seems quite analogous to the question involved in the Dartmouth College case, and counsel has approached the subject with a sense of extreme responsibility; and under the impression that the opinion which the Court will be called upon to write will be of far reaching importance and effect.

In closing it is best to re-state the precise proposition contended for by the State of New York:

The reserved police power of the States could never have been intended to be so limited by the ex post facto clause, as that the States would be precluded from taking into account a past conviction as evidence of present unfitness.

The judgment of the Court of Appeals of the State of New York should be affirmed.

ASA BIRD GARDINER,
District Attorney.

ROBERT C. TAYLOR,
Counsel of the Medical Society of the County of New York, of Counsel.

HROUGH POOR COPY